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No. 06-1614

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IN THE

Supreme Court of the United States

POOH BAH ENTERPRISES, INC., *et al.*,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR RESPONDENTS IN OPPOSITION

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant Corporation
Counsel
JANE ELINOR NOTZ *
Assistant Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-7764

* Counsel of Record

Attorneys for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether this Court's review is warranted, given that the Illinois Supreme Court applied settled law to hold that a Chicago ordinance prohibiting nude and seminude dancing at liquor-licensed establishments is subject to intermediate scrutiny because the ordinance was aimed not at suppressing expression but at combating the potentially harmful secondary effects created when sexually explicit entertainment is combined with alcohol.

2. Whether this Court's review is warranted, given that the Illinois Supreme Court applied settled law to hold that the challenged ordinance satisfies intermediate scrutiny because Chicago relied on evidence that is "reasonably believed to be relevant" for demonstrating a connection between strip clubs that serve alcohol and an increase in crime.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Pooh Bah Enterprises, Inc. ("Pooh Bah"), holds a Chicago liquor license entitling it to serve alcohol at its nightclub, located at 1531 North Kingsbury Street in the City of Chicago. Pet. App. 2. In addition to serving alcohol, this so-called "gentleman's club" provides sexually oriented entertainment featuring female dancers who remove their clothes while they dance. *Id.* at 2 & n.1. Chicago does not prohibit nude and seminude dancing at clubs within the City but does prohibit the sale of alcohol in combination with such dancing. *Id.* at 46. Pooh Bah's club is the only commercial establishment that combines the sale of liquor by the drink and dancing by seminude women. *Id.* at 5. Alcohol sales are a major source of the club's income, which is substantial. *Id.* at 7. In 2000, the club's gross revenue was $7 million. *Ibid.* By

comparison, strip clubs in Chicago that do not serve alcohol had annual revenues of only $1-2 million. *Ibid.*

Pooh Bah's entertainment has been the same since 1993, when these proceedings first began. Pet. App. 10. Patrons sit at tables, from where they can order drinks while watching dancers perform. *Id.* at 7. The dancers take off their clothes while dancing to prerecorded music, *id.* at 6-7, and, by the end of the striptease, the only item of clothing the dancers still have on is a thong, *id.* at 9.[1] The thong does not cover the dancers' buttocks. *Ibid.* The dancers are topless except for a skin-colored latex makeup substance on their nipples and areolae. *Ibid.* At most, the latex merely obscures the naturally darker color of that portion of the dancers' breasts; the breasts otherwise appear nude. *Ibid.*[2]

The dancers perform either on a stage or by doing "table dances." Pet. App. 6-8. A table dance is a brief striptease performed at the customer's table for an additional fee. *Id.* at 8. During table dances, the dancers may lick their fingers, rub and fondle their breasts, and expose their pubic region, including their labia. Tr. 90-93, 133, 160-61, 180, 1405-06, 1425. In addition, although club policy forbids physical contact with customers, the record discloses that dancers have sucked on customers' earlobes and kissed customers on the cheek during table dances. Pet. App. 8.

In 1993, Chicago's Liquor License Control Commission ("LLCC") commenced proceedings to revoke Pooh Bah's

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[1] A thong—also called a "T-bar"—is a bikini bottom that covers the pubic area, with a small waistband and a thin strip of material in the back that descends downwards through the cleft of the buttocks where it connects to the front piece through the legs. Pet. App. 9.

[2] There was extensive testimony that the latex was applied only to the nipples and areolae, and not to the sides and lower part of the breasts, and, moreover, that the color and texture of the nipples and areolae were visible through the latex. Pet. App. 9-10.

liquor and other municipal licenses based on charges that the dancers at its club exposed their buttocks and breasts in violation of Chicago's Municipal Code. Pet. App. 2, 10-11. The Code prohibits a liquor-licensed establishment from permitting "any live act, demonstration, dance or exhibition . . . which exposes to public view . . . genitals, pubic hair, buttocks . . . or [a]ny portion of the female breast at or below the areola." Municipal Code of Chicago, Ill. § 4-60-140(d) (1999) ("the alcohol ban"). The Code further provides that, for purposes of the alcohol ban, these body parts are considered to be exposed to public view if they are "uncovered or [are] less than completely and opaquely covered." *Id.* On October 15, 1993, after an evidentiary hearing, the LLCC revoked Pooh Bah's licenses. Pet. App. 11. Pooh Bah appealed to the License Appeal Commission, which affirmed and denied rehearing. *Ibid.*

Pooh Bah sought judicial review pursuant to the Illinois Administrative Review Law, see 735 ILCS 5/3-101 (2004) *et seq.* Pet. App. 11. Revocation of Pooh Bah's municipal licenses was stayed during this review, as well as the resolution of a lawsuit Pooh Bah had filed seeking a declaration that the alcohol ban is unconstitutional. *Id.* at 11-12. These proceedings were protracted, and Pooh Bah operated its strip club throughout the 1990s. *Id.* at 13. Meanwhile, in 1999, after further investigation of activities at Pooh Bah's club, the City filed a lawsuit alleging that the club constituted a public nuisance and seeking injunctive relief and fines. *Ibid.* The administrative review and nuisance cases were consolidated in the circuit court and went to trial.

At trial, the City presented 15 witnesses, and Pooh Bah presented 13. The witnesses testified not only about the entertainment presented at Pooh Bah's club, but also about the effect that establishments like Pooh Bah's may have on the

surrounding community.[3] In particular, the City presented the testimony of Police Officer Roger O'Brien, who had served in the City's 18th District Vice Unit since 1979. Pet. App. 6. Officer O'Brien stated that the 18th District covers the Rush Street area in Chicago, and that during the late 1970s and mid-1980s, there were approximately 12 or 13 strip clubs that served alcohol located in that area. *Ibid.* At that time, prostitutes could be found on every corner in the Rush Street area, and waitresses and dancers frequently solicited customers for sex inside the clubs. *Ibid.* In the 1980s, the City engaged in anti-prostitution efforts that ultimately resulted in the closure of these establishments. *Ibid.* According to Officer O'Brien, there has been an 80% decrease in prostitution arrests in the Rush street area since the strip clubs selling alcohol were shut down. *Ibid.*

Thomas Smith, Assistant Commissioner for Zoning in the City's Department of Planning and Development, testified for the City, and stated that, in his opinion, there is a relationship between sexually oriented businesses and an increase in crime. Pet. App. 33-34. In formulating this opinion, Assistant Commissioner Smith relied on his experience as an urban planner, and also on research he had undertaken when he was preparing recommendations to Chicago's City Council for amendments to the City's ordinances relating to so-called adult businesses. *Id.* at 33-34, 39. Assistant Commissioner Smith's research disclosed that, historically, the Chicago neighborhoods in which these businesses—including strip clubs where liquor was served—were located had significant

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[3] Contrary to petitioners' contention, Pet. 9, the City did not "abandon[]" its claim that the dancers' breasts are not opaquely covered during the trial. Rather, the City produced extensive evidence that the dancers' skimpy latex coverings left their areolae visible. Pet. App. 9-10. Respondents' position was and is that the latex covering does not comply with the ordinance because it does not disguise either the color or the texture of the areola, and is not applied to the breasts at or below the areola.

problems with criminal activity, particularly prostitution. *Id.* at 33. Assistant Commissioner Smith also consulted with groups such as the American Planning Association and the National Institute of Municipal Officers, and obtained and reviewed numerous studies conducted by other cities, including Indianapolis, Los Angeles, Minneapolis, Phoenix, and St. Paul. *Id.* at 34. These studies found that incidents of sex and property crimes were significantly greater in areas with sexually oriented businesses, compared to areas without these businesses. *Ibid.* In particular, some studies identified a specific relationship between the combination of alcohol sales and adult uses and the incidence of neighborhood crime. *Ibid.*

Dr. Allen Kodish, a psychiatrist and a faculty member at the University of Chicago, testified for the City and discussed the effects of combining alcohol with sexual stimulation. Pet. App. 38. He stated that alcohol facilitates sexual and aggressive impulses; impairs social judgment; and, when combined with sexual stimulation, produces an effect "associated with an increase in violent sexual acting out, acts of criminal behavior." *Ibid.* Dr. Kodish explained that the combination of alcohol and sexual stimulation overrides the normal brakes or checks people place on themselves to avoid inappropriate or dangerous behavior. Tr. 871. Thus, drinking alcohol while viewing naked or nearly naked dancers increases the likelihood that a person will act on various anti-social impulses, such as touching, screaming, and engaging in fights or other risky behavior. Pet. App. 38.

The City also adduced testimony from Dr. Wesley Skogan, a professor of political science at Northwestern University and a member of the University's Institute for Policy Research. Pet. App. 38. Dr. Skogan discussed a number of studies and articles showing that establishments that serve alcohol attract a significant amount of crime. *Id.* at 38-39. He explained that such establishments create an opportunity

for crime by bringing the potential victim and criminal together. *Id.* at 38. The victims become more vulnerable because of alcohol's disorienting effects, creating an attractive situation for potential offenders. *Id.* at 39. One of the studies showed that the combination of retail alcohol sales and adult uses created a higher incidence of crime than retail alcohol sales or adult uses operating in isolation. *Ibid.*

Pooh Bah cross-examined the City's witnesses and presented its own witnesses, including experts. Pierre DeVise ("DeVise"), a self-employed consultant retained by Pooh Bah, testified that he was not aware of any studies showing a cause-and-effect relationship between liquor establishments featuring semi-naked dancers and crime. Pet. App. 41. But he admitted that a correlation has been shown to exist between sexually oriented establishments that serve alcohol and crime. *Ibid.* DeVise stated that the study from Minneapolis (relied upon by Assistant Commissioner Smith) was excellent and by far one of the best he had seen. Tr. 2813. That study showed such businesses to be significantly related to higher crime rates. Tr. 2814.

Peter Girandola, an assistant professor of psychology at the University of Kentucky, also testified for Pooh Bah. Pet. App. 41. He opined that there are no studies showing a direct, positive relationship between viewing sexual stimuli and sexual "acting out" behavior in men, *ibid.*, but, during cross-examination, he acknowledged that studies had shown mild increases in sexual arousal in men with low levels of alcohol when they viewed erotic slides, Tr. 2484. Professor Girandola also agreed that at least one study had shown higher numbers of murders, rapes, robberies, assaults, and burglaries in areas with taverns or lounges than in areas without such establishments, Tr. 2654-57, and, moreover, that his own studies had confirmed that alcohol consumption is related to a higher level of aggression, Pet. App. 41; that a person who had been drinking might take risks that he

otherwise would not take. Tr. 2697-98; and that some men might get more violent upon drinking alcohol. Tr. 2699-700.

Rolf Campbell ("Campbell"), a planning and zoning consultant for Pooh Bah, gave his opinion that the club did not have a "negative impact on the orderly development of the immediately surrounding properties." Pet. App. 41. During cross-examination, however, Campbell admitted that he had no opinion about the relationship between land use and crime, nor had he conducted research on the relationship between either alcohol or sexually oriented businesses and crime. *Ibid.*

Based on this and other evidence, the trial court issued a memorandum opinion and order in January 2001, denying the City's request for injunctive relief and declaring the alcohol ban unconstitutional because it infringed on protected rights of expression. Pet. App. 133-54.[4] In particular, the trial court held that although the City is allowed "to enact ordinances that combat secondary effects," and, moreover, that "the City was successful in . . . positing the possibility that those secondary effects could hypothetically exist" in this case, the alcohol ban nevertheless did not pass constitutional muster because "the record [was] devoid of any proof of the existence of even potentially harmful secondary effects." *Id.* at 147-48. On appeal, the Illinois Appellate Court held that the trial court had misapplied the law, noting that the First Amendment does not require the City "to show results from a specific study around the vicinity of the Club" to justify its secondary effects rationale; instead, the City could rely on any evidence it "reasonably believes . . . is relevant to the problem the City wishes to address." *Id.* at 113. Because the

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[4] The trial court also held that the alcohol ban is impermissibly vague and overbroad. Pet. App. 148-50. These rulings were reversed on appeal, *id.* at 116-20, and the Illinois Supreme Court upheld that reversal, *id.* at 48-60. Petitioners do not challenge these rulings in their petition, and, accordingly, such challenge is waived. See Sup. Ct. R. 14(a).

City had provided such evidence, the appellate court reversed the judgment of the trial court and upheld the ordinance. *Id.* at 124. The Illinois Supreme Court affirmed, *id.* at 63, and denied rehearing, *id.* at 64.

ARGUMENT

Petitioners identify two reasons they claim this Court's review is warranted. First, petitioners contend that there is uncertainty among the state and federal courts about the appropriate level of First Amendment scrutiny that is applicable where, as here, a local government bans nude and seminude dancing at liquor-licensed establishments to combat the potentially harmful secondary effects of combining sexually explicit entertainment and alcohol. Second, petitioners insist that, regardless of the applicable level of scrutiny, the City's ordinance violates the First Amendment because the trial court found no evidence of negative secondary effects at Pooh Bah's club—even though that court acknowledged that "those secondary effects could hypothetically exist." Pet. App. 147. The Illinois Supreme Court applied settled law and correctly resolved both issues. Accordingly, both because the court's judgment fully comports with this Court's decisions and because this case raises no issue on which judicial decisions conflict, the petition for writ of certiorari should be denied.[5]

1. Since 1993, Pooh Bah has sold alcoholic drinks to its patrons while providing entertainment consisting of dancing by women wearing nothing more than thongs and latex-

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[5] In the "Questions Presented," petitioners also suggest a third question: whether the "First and Fourteenth Amendments" require a remand to the trial court "for further evidence." Pet. (i). We do not address due process separately because petitioners' one-paragraph argument in support of this claim, see *id.* at 23, can only be described as cursory. In any event, as we explain in Part 2.c, petitioners waived this argument when they failed to make it before the Illinois Supreme Court.

covered nipples and areolae. Pet. App. 10. Notably, Chicago's Municipal Code does not prohibit women from dancing for customers in this state of undress. *Ibid.* Throughout the period at issue here, establishments have been permitted to operate in Chicago that provide entertainment by dancers who wear less, and, indeed, even appear in a state of nudity. *Id.* at 10, 31. Thus, as the Illinois Supreme Court discerned, Chicago's ordinance "does not . . . forbid any speech or expressive conduct. . . . This ordinance merely prohibits [nude or seminude dancing] from being combined with the sale and consumption of alcohol." *Id.* at 54. Had the City wanted to suppress the expressive conduct associated with such performances, surely it would have directed its regulation to the dancing itself. But the alcohol ban merely regulates the sale of liquor at sexually oriented establishments.

a.i. On just this basis, numerous courts have rejected constitutional challenges akin to the one petitioners forward, upholding laws like section 4-60-140(d) because they regulate liquor sales and not the dancers' attire, much less the content of their expression. For example, in *181 South Inc. v. Fischer*, 454 F.3d 228 (3d Cir. 2006), the Third Circuit held that a state law prohibiting "lewdness or immoral activity" on liquor-licensed premises —and applied to bar sexually explicit dancing—"is not a restriction of erotic expression, but a prohibition of nonexpressive conduct (i.e., serving and consuming alcohol) on premises where such expression takes place." *Id.* at 234 (internal quotations and citation omitted). Similarly, the Seventh Circuit explained in *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003), that "[t]he question is not whether the Village can require nude dancers to wear more attire than pasties and G-strings, but whether it can prohibit Sexually Oriented Businesses like Ben's Bar from selling alcoholic beverages . . . ." *Id.* at 708. Myriad other cases are to the same effect, rejecting a First Amendment challenge to a state or local law banning nude and seminude dancing in liquor-licensed establishments. See, *e.g.*,

G.M. Enterprises, Inc. v. Town of St. Joseph, 350 F.3d 631, 636-40 (7th Cir. 2003); *BZAPS, Inc. v. City of Mankato*, 268 F.3d 603, 607-08 (8th Cir. 2001); *Artistic Entertainment, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1308-09 (11th Cir. 2000) (per curiam); *Wise Enterprises, Inc. v. Unified Government of Athens-Clarke County*, 217 F.3d 1360, 1363-65 (11th Cir. 2000); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 996-99 (11th Cir. 1998); *McCrothers Corp. v. City of Mandan*, 728 N.W.2d 124, 134-40 (N.D. 2007); *Purple Orchid, Inc. v. Pennsylvania State Police*, 813 A.2d 801, 806-13 (Pa. 2002); *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228, 1234-38 (R.I. 2000); *Goldrush II v. City of Marietta*, 482 S.E.2d 347, 355-57 (Ga. 1997); *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*, 121 Cal. Rptr. 2d 729, 734-41 (Cal. Ct. App. 2002); *American Show Bar Series, Inc. v. Sullivan County*, 30 S.W.3d 324, 333-37 (Tenn. Ct. App. 2000); *Urmanski v. Town of Bradley*, 613 N.W.2d 905, 907-11 (Wisc. Ct. App. 2000).[6]

ii. These holdings flow inexorably from this Court's cases, which have consistently upheld laws restricting nude or seminude dancing on premises licensed to serve alcoholic beverages. See *City of Newport v. Iacobucci*, 479 U.S. 92, 95 (1986) (per curiam); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981) (per curiam); *California v. LaRue*, 409 U.S. 109, 118-19 (1972).[7] At the same time,

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[6] The argument forwarded by petitioners' amici flows from the proposition that the First Amendment analysis "is the same whether alcohol is involved or not." Brief Amici Curiae in Support of Petition for Writ of Certiorari at 2. This is incorrect. Laws regulating liquor sales at sexually oriented businesses do not restrict expression. For this reason, we declined to consent to the filing of the amicus brief.

[7] These cases reflect the view that the broad powers of the states to regulate the sale of liquor pursuant to the Twenty-First Amendment outweigh any First Amendment interest in nude and seminude dancing, and states therefore have the authority to ban such dancing as a part of

the Court has held that sexually explicit entertainment is entitled to only diminished protection under the First Amendment. See, *e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion) (nude dancing "falls only within the outer ambit of the First Amendment's protection"); *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 566 (1991) (plurality opinion) (same). Indeed, "at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 49 (1986) (footnote omitted).

In *Renton*, for example, the Court upheld an ordinance prohibiting theaters offering sexually explicit films from locating in most areas of the city. The Court concluded that even though this ordinance treated such theaters "differently from other kinds of theaters," 475 U.S. at 47, it was a valid time, place, and manner restriction because the ordinance was "aimed not at the *content* of the films . . . but rather at the *secondary* effects of such theaters on the surrounding community," *id.* (emphasis in original). See also *Young v. Ameri-*

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their liquor licensing programs. See *Iacobucci*, 479 U.S. at 95; *Bellanca*, 452 U.S. at 718; *LaRue*, 409 U.S. at 118-19. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Court altered its view of the interplay between the First and Twenty-First amendments, holding for the first time that "the Twenty-First Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." *Id.* at 516. Notably, however, although the Court disavowed the reasoning employed in *LaRue* and its progeny, the Court also made clear that, "[e]ntirely apart from the Twenty-First Amendment," state and local governments have "ample power to prohibit the sale of alcoholic beverages at inappropriate locations," such as strip clubs. *Id.* at 515. Accordingly, the Court held that its "analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-First Amendment." *Id.*

can Mini Theaters, Inc., 427 U.S. 50, 70-71 & n.34 (1976) (plurality opinion) (City of Detroit could "legitimately use the content of [sexually explicit movies] as the basis for placing them in a different classification from other motion pictures."). Thus, *Renton* establishes that laws targeting businesses offering sexually oriented expression because of its "undesirable secondary effects" will be treated as content neutral and subject to intermediate rather than strict scrutiny. 475 U.S. at 48-49. The Court reaffirmed this approach as recently as *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), where it applied the intermediate scrutiny of the time, place, and manner test to a zoning ordinance applicable only to sexually explicit entertainment.[8]

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[8] Although a majority of the Court in *Alameda Books* did not agree on a single rationale for its decision, there is a majority for intermediate scrutiny. See 535 U.S. at 438 (plurality opinion); *id.* at 448 (Kennedy, J., concurring in the judgment).

Petitioners' cases, Pet. 15, do not require more rigorous scrutiny. In *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), the statute was not directed at secondary effects, but "focuse[d] *only* on the content of the speech and the direct impact that speech has on its listeners." *Id.* at 811 (emphasis in original) (citation and internal quotations omitted). The Court expressly distinguished cases like *Renton*, where the regulation is aimed at adverse secondary effects. See *id.* at 815.

Boos v. Barry, 485 U.S. 312 (1988), is even farther afield. That case concerned "*political speech* in a *public forum*," *id.* at 321 (emphasis in original)—not sexually explicit dancing. And, as in *Playboy*, the law was not justified by reference to secondary effects; it was enacted solely to "protect[] the dignity of foreign diplomatic personnel." *Id.* at 322. Moreover, the statement petitioners cite, see Pet. 15, did not command a majority of the Court, and even these Justices agreed that the law at issue did not fall within *Renton* because it was not aimed at combating negative secondary effects. See *id.* at 320-21 (O'Connor, J., joined by Scalia, J., and Stevens, J.).

Finally, in *Pap's*, the Court expressly reaffirmed the holding in *Renton* that laws regulating businesses offering sexually oriented entertainment are considered content neutral and subject to intermediate scrutiny if

Petitioners have identified only two cases—*Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299 (5th Cir. 2007), and *G.Q. Gentleman's Quarters, Inc. v. City of Lake Ozark*, 83 S.W.3d 98 (Mo. Ct. App. 2002)—in which a restriction on sexually explicit dancing at liquor-licensed establishments was struck down. But even these cases recognize that intermediate scrutiny governs laws directed at negative secondary effects. The court in *Illusions-Dallas* invalidated the law at issue because it flunked this test. See 482 F.3d at 311-15. In *G.Q.*, the court found "no evidence" that the challenged ordinance was aimed at combating negative secondary effects. 83 S.W. 3d at 103. On that basis only, the court applied strict rather than intermediate scrutiny. See *id.* Thus, rather than indicate a conflict, these cases confirm that intermediate scrutiny applies to a regulation of sexually explicit entertainment based on potentially harmful secondary effects.

iii. The Illinois Supreme Court followed this approach to the letter. The court applied intermediate scrutiny because the evidence showed that "combating the negative secondary effects caused by adult entertainment establishments was not only the predominate motive for the City's actions, it was the only motivation." Pet. App. 35. See also *id.* at 26 n.12, 31-36. As the court correctly recognized, this evidence included the legislative preamble to the 1993 adult use ordinances, where Chicago's City Council expressly explained its concerns about the deleterious effects sexually oriented businesses may have on the surrounding community. *Id.* at 32-33. In addition, the court considered the testimony of

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justified by reference to their secondary effects. See 529 U.S. at 283, 291 (plurality opinion); *id.* at 310 (Souter, J., concurring in part and dissenting in part). Even the dissenters agreed with the majority on this point. See *id.* at 319-21 (Stevens, J., joined by Ginsburg, J., dissenting). Indeed, the only Justices who diverged from this view would have upheld the ban on nude dancing even without a secondary effects justification. See *id.* at 310 (Scalia, J., joined by Thomas, J., concurring in the judgment).

Assistant Commissioner Smith, who described his research into Chicago's past problems with strip clubs selling alcohol and the experiences of other municipalities, and his conclusion that such clubs are associated with higher crime rates, *id.* at 33-34, 39; as well as the testimony of veteran Police Officer O'Brien, who detailed "the abundance of criminal activity" associated with these clubs, *id.* at 39. The court also reviewed Dr. Kodish's expert opinion that the combination of adult entertainment and alcohol "produces an effect associated with an increase in violent sexual acting out, acts of criminal behavior," *id.* at 38; and Professor Skogan's that not only do liquor establishments attract a significant amount of crime, *ibid.*, but the combination of retail alcohol sales and adult entertainment creates an even "higher incidence of crime than resulted from retail alcohol sales or adult uses operating in isolation," *id.* at 39. Finally, the court noted that the ordinance does not prohibit nude or seminude dancing outright; it merely prohibits the sale of alcohol at establishments that offer such entertainment, *id.* at 36—proof enough that the ordinance is not aimed at suppressing expression but at combating potentially harmful secondary effects. Given the extensive evidence supporting the City's secondary effects rationale, the state court rightly concluded that it was bound to review the ordinance as a content-neutral law subject to intermediate scrutiny.

b. For their part, even petitioners do not seem to doubt that at least some regulations of sexually explicit entertainment are content neutral and subject to intermediate, rather than strict, scrutiny. Petitioners submit, however, that "[t]he Court has not yet clarified when a government that has failed to meet its burden of proof with respect to secondary effects necessarily must satisfy strict scrutiny . . . ." Pet. 13. Petitioners describe two "conflicts" this purported "lack of guidance" has supposedly "spawned." *Id.* at 15. In fact, petitioners have identified no conflict, but, even if they had, resolution of that conflict would not change the outcome

of this case. Accordingly, there is no issue suitable for this Court's review.

i. First, petitioners claim there is a divergence in judicial opinion about whether, to be entitled to intermediate scrutiny, a defendant must first present evidence that the regulation of sexually explicit entertainment was aimed at combating potentially harmful secondary effects—or whether intermediate scrutiny is "presumptive[ly]" applicable to such regulations. Pet. 15-16. This "conflict" does not exist. None of the three cases petitioners cite "simply assume[d]," *id.* at 15, that intermediate scrutiny was applicable to a regulation of sexually explicit entertainment. In *Illusions-Dallas*, the court applied intermediate scrutiny because there was evidence that the law had been passed to combat negative secondary effects. See 482 F.3d at 308. In *Ben's Bar*, the challenged ordinance was accompanied by lengthy legislative findings describing the lawmakers' secondary effects rationale. See 316 F.3d at 705. And in *Café 207, Inc. v. St. Johns County*, 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272 (11th Cir. 1995), the court held that intermediate scrutiny was warranted because of evidence that the lawmakers had considered studies conducted by other localities prior to enacting an anti-nudity ordinance. See 856 F. Supp. at 645. Equally significant, the Illinois Supreme Court did not "presumptively" apply intermediate scrutiny in this case. To the contrary, as we have explained, the court applied intermediate scrutiny because the City had presented copious evidence concerning the relationship between alcohol, sexually explicit entertainment, and crime. Pet. App. 31-40. If there exists a case in which a court applied intermediate scrutiny absent any evidence of a secondary effects rationale, that case is an unidentified outlier, and, moreover, it is not this case.

ii. Petitioners' second purported "conflict" concerns the requirement, articulated by some courts, that a legislature must support its secondary effects rationale with "pre-enact-

ment evidence." Pet. 17. See also *id.* at 14. This "conflict," if it even exists, is irrelevant to the outcome of this case because the City's support for its secondary effects rationale included evidence from the time of enactment. At the outset, however, petitioners' view that the City was required to present "contemporaneous legislative findings . . . to support the . . . claim that [the ordinance] was intended to combat secondary effects," Pet. 14, is incorrect. The Court long ago established the Constitution does not require "legislative findings," when, as here, the "statute's purpose of protecting societal order and morality is clear from its text and history." *Barnes*, 501 U.S. at 567-68 (plurality opinion). In this case, moreover, the alcohol ban could hardly contain "legislative findings" articulating the Chicago City Council's secondary effects rationale. It was enacted before *Renton*, which first established that municipalities may regulate adult entertainment establishments in an effort to combat potentially harmful secondary effects, and before *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), which first held that the Twenty-First Amendment did not alone allow regulation of First Amendment activity. Only after *Renton* and *44 Liquormart* could lawmakers have known that, when regulating sexually explicit dancing at liquor-licensed establishments, they should include a legislative history explaining their secondary effects rationale.

That does not mean the City Council was unaware of the problems associated with sexually oriented businesses selling alcohol. As we have explained, Officer O'Brien testified that the City saw a decline in prostitution after shutting down a number of establishments that offered liquor and nude dancing. And Assistant Commissioner Smith testified that he made recommendations to the City Council regarding further legislation based on his opinion that there is a relationship between sexually oriented businesses and an increase in crime. Although petitioners object, Pet. 14, the Illinois Supreme Court rightly relied as well on the preamble to the

later-enacted 1993 adult use ordinances as a statement of legislative purpose. The alcohol ban was part of a "legislative package" adopted to address concerns about the secondary effects of adult entertainment establishments. Pet. App. 34. See also *id.* at 32, 36. All told, the record amply demonstrates the City Council's contemporaneous purpose of combating secondary effects.[9]

In any event, petitioners' claim of a conflict with regard to pre-enactment evidence is largely overstated. Although petitioners correctly note that some courts have required pre-enactment evidence of a secondary effects rationale while other courts have not, the cases where pre-enactment evidence was required reviewed laws adopted after *Renton* and *44 Liquormart*. See *White River Amusement Pub. Inc. v. Town of Hartford*, 481 F.3d 163, 165 (2d Cir. 2007) (2002 public indecency ordinance); *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.*, 337 F.3d 1251, 1253 (11th Cir. 2003) (1998 zoning ordinance). As we have explained, before that time, lawmakers could not have known to include a statement articulating their secondary effects rationale. Petitioners do not claim a conflict on older laws, much less where the reviewing court discerned legislative intent to regulate because of secondary effects.

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[9] Petitioners nevertheless claim that the legislative history shows that the alcohol ban was content-based. Pet. 14. As the Illinois Supreme Court explained, the cited language is not part of the ordinance itself; it is a generic description of the legislation included by the committee in its recommendation to the City Council that the ordinance be approved. Pet. App. 36. Moreover, "even if the committee's views could be imputed to the city council and even if the language it employed could be read as actually referring to the content of conduct that is protected, reference to content is not the same as suppression of content." *Ibid.* (citing *Sammy's*, 140 F.3d at 998). In any event, if the Illinois Supreme Court misconceived the legislative history, this issue does not warrant the Court's review, assuming it is even within the Court's jurisdiction.

2. Petitioners do not even attempt to identify a conflict with respect to the second question in the petition. Instead, petitioners merely disagree with the Illinois Supreme Court's determination that the alcohol ban satisfies intermediate scrutiny. Although the absence of a conflict alone is enough to deny review of this question, the Illinois Supreme Court's resolution of this issue is wholly correct.

a. After concluding that intermediate scrutiny should apply, the Illinois Supreme Court evaluated the strength of the City's evidence justifying its secondary effects rationale, including whether evidence offered by Pooh Bah "cast doubt," Pet. App. 40, on that rationale. This approach—as well as the court's determination that intermediate scrutiny was satisfied—fully complied with settled law.

In particular, this Court has "consistently held" that, when regulating erotic entertainment, "a city must have latitude to experiment, at least at the outset, and that very little evidence is required [to support an ordinance]." *Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring in the judgment). Accordingly, a municipality need only set forth evidence it "'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest," such as the control of potentially adverse secondary effects. *Id.* at 438 (plurality opinion) (quoting *Renton*, 475 U.S. at 51-52). Accord, *e.g.*, *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1168 (9th Cir. 2003) ("The record here is hardly overwhelming, but it does not have to be."); *DiMa v. Town of Hallie*, 185 F.3d 823, 829 (7th Cir. 1999) (municipality's "burden of showing that there is evidence that supports its proffered justification . . . is not overwhelming"). This includes, but is not limited to, the experiences of, and studies produced by, other cities, as well as findings in judicial opinions. See *Pap's*, 529 U.S. at 297 (plurality opinion); *Renton*, 475 U.S. at 50-51. The evidence merely "must fairly support the municipality's

rationale for its ordinance." *Alameda Books*, 535 U.S. at 438 (plurality opinion).

Indeed, a city's burden is particularly light where, as here, it seeks to regulate the sale of alcohol at sexually oriented businesses. This is because, as the Illinois Supreme Court recognized, "'[t]hat liquor and sex are an explosive combination' . . . is a proposition so frequently confirmed by human experience that it can scarcely be questioned." Pet. App. 37 (quoting *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1124 (7th Cir. 2001)). Accord, *e.g.*, *Bellanca*, 452 U.S. at 718 ("Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior."); *LaRue*, 409 U.S. at 118 (finding the "conclusion that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one"); *181 South*, 454 F.3d at 234 (describing "the 'unacceptable social behavior' that so often arises in conjunction with the combination of erotic entertainment and alcohol"); *Ben's Bar*, 316 F.3d at 708 (noting "the explosive combination of nude dancing and alcohol consumption"); *Department of Alcoholic Beverage Control*, 121 Cal. Rptr. 2d at 736-37 (it is "still broadly recognized today" that liquor and sex are an undesirable combination).

Under this minimal standard, the City's evidence—consisting of testimony about the experiences of other jurisdictions as well as Chicago itself—was more than adequate. Numerous courts have found similar evidence sufficient to justify ordinances regulating the combination of sexually explicit entertainment and alcohol. See, *e.g.*, *181 South*, 454 F.3d at 230 (state agency relied on "the long-standing judicial recognition that lewdness or immoral activity in conjunction with alcoholic beverage consumption can give rise to unacceptable social behavior") (internal brackets and quotations omitted); *Ben's Bar*, 316 F.3d at 725 (village relied on

studies done by and experiences of other municipalities and judicial opinions); *Sammy's*, 140 F.3d at 997 (city relied on studies done by and experiences of other municipalities, judicial opinions, and "wisdom and common sense"); *McCrothers*, 728 N.W.2d at 131 (city relied on studies done by and experiences of other municipalities and judicial opinions); *Purple Orchid*, 813 A.2d at 811 (board relied on experiences of foreign jurisdictions); *Goldrush II*, 482 S.E.2d at 367 (city relied on "the experiences of other cities that the council members reasonably believed to be relevant to the problems faced by Marietta"); *Urmanski*, 613 N.W.2d at 910 (town relied on information provided by the League of Municipalities and judicial opinions). There is no question under this unvarying standard that the City set forth evidence sufficient to justify its secondary effects rationale.

Moreover, the Illinois Supreme Court correctly concluded that Pooh Bah failed to call that rationale into question. In particular, Pooh Bah presented no evidence challenging the veracity of the historical account presented by Assistant Commissioner Smith and Officer O'Brien. Instead, Pooh Bah merely criticized the opinions proffered by the City's experts. As the Illinois Supreme Court recognized, however, these complaints did not undermine the City's rationale for its ordinance. Devise actually admitted on cross-examination that a correlation had been shown to exist between sexually oriented businesses that serve alcohol and an increased incidence of crime, while Professor Girandola confirmed that alcohol consumption is related to a higher level of aggression. Pet. App. 41. As for Campbell, he conceded that he had no opinion about the relationship between land use and crime and had conducted no research regarding the relationship between either alcohol or sexually oriented businesses and crime. *Ibid.*

At worst, Pooh Bah's experts disagreed with the City's experts about whether the City's concerns will be addressed

by the enforcement of the ordinance. But a "city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young*, 427 U.S. at 71 (plurality opinion). Indeed, "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners." *Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring in the judgment). See also *id.* at 440 (plurality opinion) ("we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems"). Thus, "mere differences of opinion" are not grounds for invalidating an ordinance. *McCrothers*, 728 N.W.2d at 138; accord, *e.g.*, *G.M.*, 350 F.3d at 639, much less for this Court's review of this fact-specific issue.

b. Although petitioners identify no conflict on this issue, they nevertheless argue that this case justifies review because it presents a "situation" that "[n]one of this Court's prior cases directly address [sic]." Pet. 20, that is, "whether a City regulation of expression may be upheld when a trial court finds that there is *no* evidence of harmful secondary effects emanating from the regulated expressive activity . . . ." *id.* at 19 (emphasis in original). Petitioners' view that the City was required to present evidence of adverse secondary effects associated with Pooh Bah's club itself to enact the alcohol ban or enforce the ordinance against it is incorrect.[10]

i. As this Court's cases make clear, an ordinance can be properly directed at the adverse secondary effects of sexually explicit entertainment based solely on evidence that those

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[10] In any event, contrary to petitioners' suggestion, the record is not bare on this point. The testimony of Pooh Bah's own witnesses reveals the pernicious secondary effects of the club itself. On one occasion, the police had to be called because a customer "expose[d] his erect penis and was stroking it in full view of other patrons and the entertainers." Pet. App. 8 n.7. The police were also summoned to deal with assaults both inside and outside of the club. *Id.* at 43.

secondary effects have been experienced in other cities. A "city need not conduct new studies or produce evidence independent of that already generated by other cities to demonstrate the problem of secondary effects, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Pap's*, 529 U.S. at 296 (plurality opinion) (citation and internal quotations omitted). Accord *Renton*, 475 U.S. at 50-52 (accepting City of Renton's reliance on the experience of Seattle as expressed in findings summarized in a prior decision). Accordingly, the state and federal courts have consistently held that a local government is not required to demonstrate adverse effects in its particular locality but may constitutionally rely on relevant studies from other areas. For example, in *Ben's Bar*, the court noted that the view that a local government "may not rely on prior judicial decisions or the experiences of other municipalities, but instead must conduct its own studies, at the local level . . . has been expressly (and repeatedly) rejected by the Supreme Court." 316 F.3d at 725. Accord, *e.g.*, *Bronco's Entertainment, Inc. v. Charter Township of Van Buren*, 421 F.3d 440, 451 (6th Cir. 2005); *Heidman v. South Salt Lake City*, 348 F.3d 1182, 1198 (10th Cir. 2003); *Jake's, Ltd. v. City of Coates*, 284 F.3d 884, 888 (8th Cir. 2002); *Artistic Entertainment*, 223 F.3d at 1309; *McCrothers*, 728 N.W.2d at 129; *Purple Orchid*, 813 A.2d at 811; *Restaurant Ventures v. Lexington-Fayette Urban County Government*, 60 S.W.3d 572, 578 (Ky. Ct. App. 2001); *El Marocco*, 746 A.2d at 1237-38; *Department of Alcoholic Beverage Control*, 121 Cal. Rptr. 2d at 736 n.10; *American Show Bar*, 30 S.W.3d at 334.

Petitioners' cases do not suggest otherwise. Instead, they address different issues. The problem in *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), was that "the county's own studies negated the very interests it purportedly sought to prevent." *Id.* at 986. Thus, while that court agreed that "a governmental entity is not required to

perform empirical studies," it ruled that, "having done so, the [government] cannot ignore the results." *Ibid.* In *Illusions-Dallas*, the state supported its secondary effects rationale by referencing various foreign studies, but the district court excluded the studies, and the state did not challenge the exclusion on appeal. See 482 F.3d at 313. As the case came to the Eleventh Circuit then, there was no evidence of secondary effects, and the court struck down the challenged law. See *ibid.* But the court nevertheless noted that "the outcome could potentially have been different" had there been studies in the record. *Id.* at 315 n.11. And in *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003), the court ruled that studies of businesses providing on-site entertainment could not justify an ordinance restricting the location of sexually oriented businesses selling videos and books, which are less likely than on-site businesses to produce harmful secondary effects. See *id.* at 294-95. Because this case presents none of these issues, it cannot conceivably conflict with petitioners' cases.[11]

ii. Petitioners attempt to avoid the settled rule that a municipality is not required to conduct its own studies by suggesting that there should have been evidence that "the

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[11] Petitioners also claim there exist "marked inconsistencies" in the Seventh Circuit's approach to the regulation of sexually explicit entertainment. Pet. 25. This claim can be ignored for purposes of granting review, but it is wrong in any event. The results in *Ben's Bar* and *R.V.S., LLC v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004), reflect differences in the ordinances at issue. *Ben's Bar* upheld an ordinance that, like the alcohol ban, prohibited nude and seminude dancing on liquor-licensed premises, see 316 F.3d at 707-08, while the ordinance in *R.V.S.* prohibited even clothed dancers from engaging in certain erotic movements, see 361 F.3d at 404-05. In striking down Rockford's ordinance, *R.V.S.* held that the city had failed to identify evidence "directly relevant to the type of entertainment that [it] seeks to regulate." *Id.* at 411. Notably, however, the court reaffirmed the holding in *Ben's Bar* that the ordinance challenged there was valid. See *id.* at 413.

additional covering of the buttocks (or sides of breasts) required by the Chicago Ordinance would have . . . [an] effect on secondary effects." Pet. 20. The Court expressly rejected this type of argument in *Alameda Books*, which addressed an ordinance prohibiting multiple entertainment businesses from operating in the same building. In enacting the ordinance, Los Angeles primarily relied on a planning department study, which indicated that crime had grown at a much higher rate in Hollywood, which had the largest concentration of sexually oriented establishments in the city, than in the city as a whole. See 535 U.S. at 435. The Ninth Circuit found that the study did not reasonably support the inference that a concentration of operations in the same building produced higher crime rates. See *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719, 724-25 (9th Cir. 2000). The Court reversed, explaining that the court of appeals had erred in requiring the city to prove that its theory about a concentration of operations is a "necessary consequence." 535 U.S. at 437 (plurality opinion) (emphasis deleted). To the contrary, under *Renton*, the city need rely only "on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest." *Id.* at 438. See also *id.* at 449-52 (Kennedy, J., concurring in the judgment) (study relied on by city satisfies the "reasonably believed to be relevant" standard).

Following this approach, the lower federal courts have universally dismissed arguments like petitioners'. For example, in *Ben's Bar*, the Seventh Circuit ruled that the village did not need to present evidence "relating specifically to the effects of serving alcohol in establishments offering nude and semi-nude dancing," 316 F.3d at 725, or demonstrating that "the incidental restrictions placed on Ben's [Bar], over and above the pasties and G-string requirement, ameliorate any purported negative secondary effects," *id.* at 726. The court explained that, under established precedents and common sense, the village's secondary effects justification "was en-

tirely reasonable." *Id.* at 726. Accord, *e.g.*, *Gammoh v. City of La Habra*, 395 F.3d 1114, 1127 (9th Cir. 2005); *Baby Dolls Topless Saloons v. City of Dallas*, 295 F.3d 471, 481-82 (5th Cir. 2002); *Purple Orchid*, 813 A.2d at 811. Indeed, in *BZAPS*, the Eighth Circuit rejected an argument similar to petitioners' on the ground that no precedent requires a municipality to obtain research targeting the exact activity it wishes to regulate. See 268 F.3d at 606-07. As the court explained, "We are satisfied that neither the first amendment nor Supreme Court precedent require the City to do the impossible." *Id.* at 607.

iii. Petitioners also rely on their view that the City's justifications for its ordinance "unraveled" during the litigation. Pet. 20. See also *id.* at 21 (describing the so-called "evidentiary failures and shifting rationales"). Contrary to petitioners' suggestion, *id.* at 20-21, the City never sought to prove a correlation between strip clubs that serve alcohol and decreased property values. The City's position throughout the trial was that the combination is correlated with crime. Tr. 3050-51. It is not unusual for a plaintiff, by the time of trial, to narrow the claims contained in its original pleading, so the allegation regarding property values in the City's complaint is beside the point. The same is true of the City's determination to focus its appeal not on the trial court's finding that the City had not sustained its burden of proof with regard to the prostitution charge, but on that court's conclusion that the alcohol ban was unconstitutional. Like a decline in property values, it was not necessary for the City to prove prostitution. Thus, these trial decisions, in addition to being fact-bound, do not call into question the Illinois Supreme Court's determination that Chicago's ordinance complies with the First Amendment.

c. This same obsession with the vagaries of this particular case dooms petitioners' argument that upholding the alcohol ban on this record raises both "a serious due process

question under the Fourteenth Amendment," Pet. 23, and "an important procedural question of First Amendment litigation," *id.* at 21. These questions have no significance outside this case. In addition, petitioners failed to forward a due process argument in their appeal to the Illinois Supreme Court, and, accordingly, any such argument is inappropriate for review by this Court. See, *e.g.*, *Glover v. United States*, 531 U.S. 198, 205 (2001); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). There is no reason to depart from that rule here.

As for petitioners' claim of an important First Amendment issue, it centers on an agreed order entered by the trial court to provide for immediate appeal of that court's ruling that the alcohol ban is unconstitutional. Petitioners believe they were entitled to a remand by virtue of the agreed order. Pet. 5, 21-22. The state court's reading of this order is no basis for this Court's review. In any event, as the Illinois Supreme Court recognized, petitioners' "sole reason" for requesting a remand is to "to renew and bolster [their] contention that the ordinance violates constitutional standards." Pet. App. 63. But petitioners had a full and fair opportunity to litigate this issue. At trial, Pooh Bah both cross-examined the City's witnesses and presented its own witnesses, including experts, who gave testimony directed at establishing that the ordinance was not justified by reference to adverse secondary effects. Petitioners have never identified what relevant evidence they think they have to present on remand, although we questioned this in the Illinois Supreme Court. It is not surprising that the court did not order a remand for evidence never identified. As far as appears, petitioners seek to present further evidence questioning the City's reliance on the secondary effects rationale. This effort was doomed from the outset because the City's burden was merely to identify evidence that it "reasonably believed to be relevant," not to prove the wisdom of its regulation to the trial court. There is surely no reason for a remand to continue this failed theory.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant Corporation
Counsel
JANE ELINOR NOTZ *
Assistant Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-7764

* Counsel of Record

Attorneys for Respondents

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